Supreme Court, U.S.
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NO. _____

In The

Supreme Court Of The United States

October Term, 1994

TEXANS UNITED EDUCATION FUND

Petitioner,

VS.

TEXACO, INC. AND TEXACO CHEMICAL CO.,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Has the Texas Supreme Court violated the petitioner's right to procedural due process in its failure to refer the Motion to Recuse to the Governor of the State of Texas for her appointment of an independent body to determine the recusal issue?

2. Has the Texas Supreme Court violated the petitioner's right to procedural or substantive due process by failing to recuse itself under the circumstances presented?

3. Have the respondents to this case, Texaco and Texaco, Inc., violated the petitioner's rights to access to the courts and procedural due process by agreeing to seal court records affecting the public health and safety and properly and equally applying Rule 76a of the Texas Rules of Civil Procedure to persons who were not parties to the case or who were not otherwise present and able to contest the return of court records at the time such confidentiality agreements were made?

4. Has the trial court violated the Petitioner's right to substantive and procedural due process by denying it an evidentiary hearing on the questions of the identity and sealing of "court records?"

5. Has the Texas judicial system denied the petitioner's substantive and procedural due process rights by refusing to allow Texans United a hearing before a court of competent factual jurisdiction to determine contested issues presented to the court for review (prior to the Texas Supreme Court's determination of the substance of the legal issues presented)?

6. Was the Texas judicial branch decision permitting the agreed, secret removal of court records having a potentially devastating impact on the public health, safety and welfare, without public notice or hearing, a violation of Petitioner's right of free speech and/or of the press as guaranteed by the First Amendment to the United States Constitution?

7. Did the removal of records from the public domain, under a secret confidentiality agreement and without public hearing, violate the rights of the press and public to information concerning the workings of government, and deny them access to public property without due process of law?

PARTIES TO THE PROCEEDINGS

The names of all of the parties to the proceedings are as follows:

Petitioner:

TEXANS UNITED EDUCATION FUND

Attorney for Petitioner:

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Houston, Texas 77002

Respondents:

TEXACO, INC. and TEXACO CHEMICAL CO.

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Other Interested Parties:

JOHN R. SEXTON

Attorney for John R. Sexton:

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Trial Court Judge:

The Honorable Eugene Chambers
Judge, 215th District Court
1019 Congress, 16th Floor
Houston, Texas 77002

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Petitioner,

VS.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Texans United Education Fund, respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of Texas which allowed the removal of records from the public domain, refused to grant Petitioner's request for an evidentiary hearing and refused to refer the Motion to Recuse to an independent panel of jurists or to the Governor of the state for neutral determination as required by law, all of which constitute violations of the petitioner's rights under the First and Fourteenth Amendments to the United States Constitution.

REFERENCE TO THE REPORTS/OPINIONS DELIVERED

The original trial court case is styled *John R. Sexton, Plaintiff v. Texaco Inc., Texaco Chemical Co., L. Garbrecht, Jr. and W.B. Reals, Defendants*, cause number is 89-006630 in the 215th Judicial District Court of Harris County, Texas. The later filed Petition in Intervention is styled *Texans United Education Fund and Valorie W. Davenport, Intervenors, v. Texaco Inc. and Texaco Chemical Co., Defendants*, also filed in the 215th Judicial District Court of Harris County, Texas. The appeal, styled *Texans United Education Fund and Valorie W. Davenport, Appellants v. Texaco Inc. and Texaco Chemical Co., Appellees* was filed in the 14th Court of Appeals under cause number A14-92-01201-CV. The Writ of Error to the Texas Supreme Court is styled *Texans United Education Fund and Valorie W. Davenport, Petitioners v. Texaco, Inc. and Texaco Chemical Co., Respondents*, cause number D-4158.

STATEMENT OF GROUNDS FOR JURISDICTION

The Order to Dismiss Texans United Education Fund's and Valorie W. Davenport's Petition in Intervention was signed and filed on October 9, 1992. (Appendix A). The 14th Court of Appeals Opinion was rendered and filed on July 1, 1993. (Appendix B). The Supreme Court of Texas denied Petitioners' Application for Writ of Error on September 1, 1994. (Appendix C). The Supreme Court of Texas denied Petitioners' Motion to Recuse on October 6, 1994. (Appendix D). The Supreme Court of Texas denied Petitioners' Motion for Rehearing of Application for Writ of Error and Motion for Rehearing on Motion to Recuse on November 3, 1994. (Appendix E). This Court's jurisdiction is invoked under Title 28, U.S.C. §1254(1).

APPLICABLE STATUTES AND CONSTITUTIONAL PROVISIONS

1. TEX.R.APP.P.15. RECUSAL OR DISQUALIFICATION OF JUSTICES OF COURTS OF APPEALS, THE SUPREME COURT AND JUDGES OF THE COURT OF CRIMINAL APPEALS

(c) Prior to any further proceeding in the case, the justice or judge shall either recuse himself or certify the matter to the entire court, which will decide the motion by a majority of the justices or judges of the court sitting en banc. A justice or judge who is challenged shall not sit en banc to consider the motion. If a majority of the justices or judges are challenged, the court shall nonetheless decide the motion as to each justice or judge, one at a time, by a majority of the justices or judges sitting en banc except the particular justice or judge being considered each time shall not sit en banc to consider the motion as it directly affects that justice or judge.

2. TEX.R.APP.P.15a. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF APPELLATE JUDGES

A judge of an appellate court shall disqualify or recuse himself in any proceeding in which judges must disqualify or recuse themselves under Texas Rule of Civil Procedure 18b, or in which he participated in the trial or decision of any issue in the court below.

3. **TEX.R.APP.P.18b. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF JUDGES (This section is provided in full in the attached appendix)**

(1) Disqualification. Judges shall disqualify themselves in all proceedings in which:
(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy;
(4) In this rule:
(d) "financial interest" means ownership of a legal or equitable interest, interests, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that: (v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

4. **TEX.R.CIV.P. 76. MAY INSPECT PAPERS**

Each attorney at law practicing in any court shall be allowed at all reasonable times to inspect the papers and records relating to any suit or other matter in which he may be interested.

5. **TEX.R.CIV.P. 76a. SEALING COURT RECORDS**

(This rule is provided in full in the attached appendix)

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:
(1) this presumption of openness;
(2) any probable adverse effect that sealing will have upon the

general public health or safety;
(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

6. TEX. CONST. art. V, §11. DISQUALIFICATION OF JUDGES; EXCHANGE OF DISTRICTS; HOLDING COURT FOR OTHER JUDGES

Sec. 11. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

And the District judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law.

7. TEX.CONST. art. V, §28. VACANCIES IN JUDICIAL OFFICES

Sec. 28. Vacancies In Offices Of Judges Of Superior Courts To Be Filled By The Governor.

Vacancies in the office of judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and the District Courts shall be filled by the Governor until the next succeeding General Election; and vacancies in the office of County judge and Justices of the Peace shall be filled by the Commissioners court until the next succeeding General Election.

8. U.S.CONST. art. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE FACTS WHICH ARE MATERIAL TO THE QUESTIONS PRESENTED

John R. Sexton ("Sexton") was head of corporate safety for Texaco Corporation, ("Texaco") a Respondent in this case. Shortly before his termination from a career that had lasted for over thirty (30) years, Sexton was called by Texaco's Chairman of the Board and asked to investigate certain plants and facilities owned and operated by Texaco. During the course of these hazard evaluations and/or studies, Mr. Sexton uncovered various hazards and violations of both state and federal law. He immediately reported these violations/hazards to Texaco management. Sexton also requested a follow-up investigation and correction of those problems. The company delayed and avoided further action and John Sexton, for the next year (and what was eventually the remaining period of his employment), continued to insist that Texaco fulfill its legal and moral obligations. When Sexton's complaints bacame too vocal and his insistence that Texaco take corrective action became too adamant, Texaco

terminated Mr. Sexton's employment, ostensibly due to its "change in management style."

Sexton sued Texaco for wrongful termination and a variety of claims including Texas' common law version of a "whistle-blower" cause of action. During the course of those complaints, discovery was taken through requests for production, interrogatories and depositions whereby the various hazards uncovered by Sexton were revealed and documents supporting the existence of those hazards and the validity of his concerns were requested and produced or placed under seal with the state district court.

Texaco contended that even if the allegations made by John R. Sexton were true, Texas law did not allow an employee who was fired under these circumstances to bring a wrongful termination case against his employer. In short, it was Texaco's position that, regardless of whether or not Sexton was prevented from doing that which was legally required, he was not specifically "asked to do an illegal act" and, therefore, his termination (for his threat of exposure of the violations, etc.) was not improper under Texas law.

The trial court judge denied much discovery and ultimately granted summary judgment in Texaco's favor on many of the causes of action. An expedited review of the decision denying discovery, through an application for writ of mandamus, was filed in the Texas Court of Appeals. The Texas Court of Appeals "granted leave to file the application for writ of mandamus," thereby indicating that it was of the tentative opinion that Mr. Sexton was entitled to the relief requested (thereby implying that a cause of action did exist under these circumstances). TEX. R. APP. P. 121(c). Shortly thereafter, Texaco settled its case with Mr. Sexton; however, as part of the settlement agreement, Texaco required Sexton to keep all information confidential as well as to return all records, including safety related documents and copies thereof, which he had been provided (by Texaco) as a part of formal production. Many of the documents slated to be returned were directly related to matters affecting the public health, welfare and safety. As a result, co-counsel for Sexton objected to any condition of the agreement which required the return of formal production. It was co-counsel's position that any agreement that these documents be returned was in violation of Rule 76 and 76a

of the Texas Rules of Civil Procedure. Rules 76 and 76a guarantee and provide lawyers and members of the general public continued access to court records, especially those that relate to matters affecting the public health and safety. In fact, Rule 76a prevents the sealing of such court records without a hearing, regardless of whether or not the records are formally on file with the court or district clerk (versus held by counsel as unfiled discovery). Sexton's lead counsel filed a motion to dismiss the court of appeals action (over co-counsel's objection), an act designed to eliminate the only existing vehicle by which the agreed return of safety related discovery could be challenged.

Rule 76 and Rule 76a of the Texas Rules of Civil Procedure provide and guarantee the public and press access to "court records" as a part of the procedural due process guaranteed by the United States Constitution as well as the Texas Open Courts Provision. Co-counsel requested that, as part of its ruling on Sexton's Motion to Dismiss, the Court of Appeals instruct all counsel to preserve the documents at issue. The appellate court delayed ruling for four months, after which time, it dismissed the mandamus action without comment as to either parties' need to preserve or return the safety related documents at issue. (Like a Motion for Non-suit, Sexton's Motion to Dismiss the appellate court action was mandatory, and arguably stripped the appellate court of anything but the ministerial power to dismiss).

After the dismissal, co-counsel, Valorie W. Davenport, and now Petitioners Texans United Education Fund, were forced to file a Plea in Intervention pursuant to Rule 76a of the Texas Rules of Civil Procedure, in which they sought to preserve and protect the safety related discovery. Texans United Education Fund, the newly added Petitioner for purposes of the subsequent intervention (and the only Petitioner in this case), is a non-profit public interest group concerned with environmental issues such as those raised by the Texaco investigation. That group shared co-counsel's concern over the return and possible destruction of safety related documents and joined her in the filing of a Petition in Intervention in which they requested that a hearing be held to determine the right and need to preserve the evidence at issue.

Stating that the Petition in Intervention, which was filed within thirty days of the appellate court's dismissal of the mandamus, was not timely, the trial court refused to hold an

evidentiary hearing in order to determine whether or not safety records were, in fact, being improperly returned. Although Rule 76a appears to provide for perpetual jurisdiction over discovery (document) matters, the trial court held that it lacked jurisdiction to hear the document challenge and then dismissed Petitioners' intervention for "lack of jurisdiction."

Petitioner, Texans United Education Fund, together with then Co-Intervenor, Co-Counsel Valorie W. Davenport, appealed to the Texas Court of Appeals, seeking to reverse the trial court's dismissal for want of jurisdiction and force the trial court to hold the necessary evidentiary hearing to determine the nature of documents covered by the agreements as well as to identify which documents, if any, constituted "unfiled discovery" under Rule 76a.[1] The Texas Court of Appeals held that the trial court correctly dismissed the matter and likewise dismissed the case for "want of jurisdiction." An Application for Writ of Error was filed with the Texas Supreme Court and the same remained pending for almost a year. On September 1, 1994, the Texas Supreme Court denied Petitioners' Application for Writ of Error, not because of "want of jurisdiction" (the basis held by the two lower courts) but rather on the apparent basis that the facts or issues presented were not of sufficient importance to the jurisprudence of the state to warrant Supreme Court consideration. The notation on the Court's denial of the Application for Writ of Error was "writ denied." TEX.R.APP.P. 133. In essence, the appellants, now petitioners, were denied any fact-findings by the courts of competent fact-finding jurisdiction (i.e. the trial court and the court of appeals) only to have the Texas Supreme Court assume jurisdiction, but deny them consideration because the issues, as shown through facts which Petitioner had been denied the opportunity to properly develop, lacked merit.

The petitioners had expected that the Texas Supreme Court would consider only the issue of whether or not the lower courts possessed continuing jurisdiction under Rule 76a and, if jurisdiction was found to exist, then remand the case to a court of competent (factual) jurisdiction to hear and determine the

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1 It was co-counsel's position that the return of these documents violated Rule 76a and therefore, that the Lawyer's Creed and her Code of Professional Ethics required her to contest the agreement to the extent that the agreement to return safety related discovery breached the Texas Rules of Civil Procedure or was otherwise illegal.

underlying fact issues and thereby determine whether or not an improper sealing order had occurred. By finding jurisdiction sufficient to issue a "writ denied," the Supreme Court found that jurisdiction existed, not only in Austin, but in the lower two courts. Certainly, had the lower courts been devoid of jurisdiction, there would have been no proper mechanism for the case to have reached the Supreme Court. Since jurisdiction could not have suddenly materialized only at the final stage of the appellate process, logic requires us to conclude that the Texas Supreme Court determined that jurisdiction existed at the two lower courts as well, and that those courts' rulings (finding no jurisdiction) were erroneous. Petitioner contends that, since the Texas Supreme Court was without the authority to make a factual determination, the petitioner was deprived of their right to a determination and hearing of factual issues by a court of competent jurisdiction. TEX.CONST. ART. V. § 6. These implied fact findings (by the Texas Supreme Court) caused another wrinkle to arise.

The hazardous conditions uncovered by Sexton at one of the plants at issue, specifically Texaco's Austin Lab where many of the violations allegedly occurred, potentially jeopardized the persons who lived and/or worked in a 10-mile radius of land surrounding the facility. As to the Austin Lab, this area included the building housing the Texas Supreme Court. As such, if the court were to determine fact-based issues or even review the evidence from a factual point of view, the members of the Court were each, individually, among those citizens who could be affected by the court's ruling with regard to the underlying issues of fact. Once the court assumed jurisdiction and addressed the fact-based issues, the relevant question became whether or not the present sitting members of the Texas Supreme Court (who were working and possibly living in the potentially affected area) should be the jurists who considered and resolved the questions presented.

Therefore, once the Supreme Court assumed jurisdiction (and simultaneously rendered its decision to refuse review of the merits of the underlying issues), Appellant filed a Motion to Recuse the present sitting members of the Texas Supreme Court. This motion was based on the fact that the present members clearly were among the limited segment of the public who lived and/or worked in the potentially affected area. Therefore, each and

every member of the court had a personal and direct potential interest in the subject of the litigation.[2] A request for recusal of the entire court is not unique or without Texas procedural precedent. In the case of *Johnson v. Darr*, 272 S.W. 1098 (Tex. 1925), the Texas Supreme Court was forced to recuse itself and allow the governor of the state to appoint an all female independent Supreme Court to hear the particular matter at issue.

Petitioner contends that, once a motion to recuse is filed, the law requires that the court and/or challenged jurist halt any further action until the recusal issue is determined. As a general rule, the issue of recusal is determined by neutral third parties whose bias, prejudice or potential interest in the matter at issue is not in question. The need for a neutral body or jurist to determine the issue typically necessitates a referral of the issue to an unaffected jurist or panel or court (or in this case to the governor of the state of Texas for appointment of a neutral body) to determine whether or not recusal is necessary.

However, once challenged, the Texas Supreme Court did not follow any of those alternatives. Under present Texas appellate court law, the Supreme Court apparently allowed the other sitting jurists to collectively rule on the Motion to Recuse as it pertained to each of their challenged brethren. While this may arguably be proper in situations where each of the members of the court are challenged on different grounds, in this case their commonality of interest and the unity of the basis for challenge was such that Petitioner's recusal argument applied equally to all sitting members of the Texas Supreme Court. Petitioner contends that to allow eight of the justices (who had been challenged under similar grounds) to make the determination as to whether or not the ninth remaining justice should be recused, (then have the other justices determine that same issue as it applied to the eighth justice, etc.) denied the petitioner its right to procedural and substantive due process of law. The end result was that the Texas

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2 This is not standard "public interest litigation" where all jurists in Texas would be similarly situated. In this instance there was a 10-mile radius potentially affected by the hazards present at the Austin lab. The Supreme Court Building, the working environment for each and every one of the justices then empaneled to hear the matter, was squarely within the allegedly affected area. Therefore, the propriety of that body (or of any jurist within that same 10-mile radius) to hear the issues to be presented, posed a real and legitimate concern. There are hundreds, if not thousands, of other jurists qualified within the state, who reside outside the affected area, who were available for appointment and whose neutrality and impartiality would not be subject to question.

Supreme Court, through review by its own jurists who sat individually challenged on the same basis, determined that recusal of each and/or all of the individual justices was not required. The Supreme Court then "denied" Petitioners' Motion to Recuse, "denied" the Motion for Rehearing on the Motion to Recuse and again "denied" the Petitioners' Motion for Rehearing on Petitioners' Application for Writ of Error.

Petitioner of this Honorable Court contends that several constitutional violations occurred which include the following: (1) denial of its access to the courts and to public records through the improper sealing of court records; (2) denial of Texans United Education Fund's equal right to protection under the laws, through holding that its challenge to the sealing of safety documents was untimely although it had no notice of the original action and was not a party to the case; (3) the denial of procedural and substantive due process through the failure of the Texas Supreme Court to refer Petitioners' Motion to Recuse to the Governor so that the same could be heard by an independent neutral body whose jurists were not subject to challenge on the same basis as those challenged in the matter to be decided; and (5) by denial of the motion to recuse, petitioner was denied its right to a fair and neutral body to hear and resolve relevant fact issues which were to form the substantive basis for the Intervention contesting the propriety of the confidentiality agreement and the parties' agreed return of safety related court records (without benefit of hearing). Petitioner contends that these acts and omissions were also in violation of its, the press' and the public's right to public information generated in connection with our judicial branch of government.

REASONS FOR GRANTING THE WRIT (ARGUMENTS)

1. THE FINDING OF JURISDICTION AND REFUSAL TO REMAND THE CASE FOR FACT FINDINGS AND DEVELOPMENT OF THE UNDERLYING ISSUES CONSTITUTES DENIAL OF THE PETITIONER'S RIGHT TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS. (Relevant to Question 4 and 5).

Once a claim has been found to have been improperly dismissed for want of jurisdiction, a claimant should have access to the courts to address the merits of the underlying issue, prior to a determination of his claim. Contested facts should be resolved only after the movant has had the opportunity to present evidence in keeping with the rules of evidence and procedure. In this instance, Rule 76a provided for an evidentiary hearing which should have allowed the movant to present evidence so as to determine a plethora of issues, including: whether or not documents were court records, (including unfiled discovery); whether any or all returned documents which were the subject of the protective order were, in fact, otherwise on file through other motions; and/or, whether the terms and continued application of an earlier protective order amounted to the sealing of safety related discovery without the requisite showing that the need therefor outweighed the public's right and/or need for the information sought to be rendered "confidential" and therefore inaccessible.

In matters of this nature, the Texas Court of Appeals is the last court of fact finding jurisdiction. TEX. CONST. ART. V. § 6. Therefore, absent an evidentiary hearing in the trial court, "a bystanders bill," or other competent evidence presented to the court of appeals, the Texas Supreme Court was left to evaluate the statements made by Texaco and its counsel to refute the charges and claims made by the Petitioner/ Intervenor/Movant. If Petitioner's claims are true, then the issues presented suggest facts and circumstances which are highly important to Texans and to the jurisprudence of our state. Any finding that the issues were not of such import so as to require review must, by definition, have included a weighing of the "allegations," "facts" and "evidence" then before the court. In this instance, although there are indeed allegations, Petitioner was never permitted to present, for actual consideration, the facts made the basis for Petitioner's claim (and

concerns). The Texas Supreme Court, by finding jurisdiction, but refusing to hear the merits of the matter or remand the case so that the facts could be fully developed in the lower courts (which are vested with factual jurisdiction), thereby deprived the petitioner of due process of law, both on a procedural and substantive basis.

2. THE DISMISSAL OF TEXANS UNITED'S CLAIMS (INTERVENTION, ETC.) FOR WANT OF JURISDICTION, EVEN THOUGH TEXANS UNITED WAS NOT A PARTY TO THE ORIGINAL CASE, IS A VIOLATION OF TEXANS UNITED'S RIGHT OF ACCESS TO THE COURTS AND TO PROCEDURAL DUE PROCESS OF LAW." (Relevant to Question 3).

Texans United was not a party to the original wrongful termination claim brought by John R. Sexton. It was not involved in, nor did it have knowledge of, the parties ultimate agreement for the return and potential destruction of court records vis a vis the return of all Texaco documents (and all copies thereof) provided in answer to Plaintiff's Request for Production, which necessarily included certain safety related unfiled discovery. Because of the confidentiality agreement signed by John R. Sexton, he could not properly confirm or deny the nature and content of documents slated for return.

Rule 76a expressly allows an intervention challenging the return or sealing of discovery to be filed at any time, before or after judgment. Even, assuming arguendo, that counsel Davenport's claims should or could have been more timely asserted and, therefore, that she was estopped from raising the issue through a later filed Plea in Intervention, Texans United was not a party and therefore did not have the opportunity to timely challenge the trial court's action. Therefore Texans United Education Fund has been denied equal access to the courts and equal protection under the laws (by virtue of its non-party/non-agency status). The dismissal deprived Texans United of its rights of access to court records and to the courts, rights clearly conferred upon others pursuant to the provisions of the Rule and the State and Federal Constitutions. Such deprevation occurred before Texans United knew, should have known or could have known of the subject matter of the confidentiality agreement which ultimately resulted in the possible improper return of unfiled, safety related discovery.

3. IF THE TEXAS RULES OF APPELLATE PROCEDURE, RULE 15(c), ALLOW FOR THE REMAINING JUSTICES OF THE TEXAS SUPREME COURT TO HEAR AND RESOLVE AN ISSUE OF RECUSAL, THE NATURE OF WHICH WAS COMMON TO ALL SITTING MEMBERS, THE RULE ITSELF VIOLATE TEXANS UNITED'S RIGHT TO PROCEDURAL DUE PROCESS OF LAW. (Relevant to Question 1).

The Fourteenth Amendment to the United States Constitution guarantees a litigant a fair and impartial tribunal for resolution of civil and criminal matters within the judicial system. If the Texas Supreme Court is permitted to pass rules of appellate procedure which essentially allow jurists to decide the correctness or validity of a movant's recusal request, when they, themselves, stand challenged upon the same basis as the member whose ability to preside is then under question, a violation of the movant's due process rights under the Fourteenth Amendment has occurred. If this is to be allowed, the result is that the now exonerated jurist, still in a grateful state of euphoria, may reexamine those exact facts (or even rely on the court's earlier holding under the doctrine of stare decisis) and apply the same ruling to his brethren, also challenged, who just determined that his/her own recusal was not required. Where the interest being challenged is identical, all challenged jurists should be estopped from determining the merits of the recusal motion under consideration.

4. THE REFUSAL BY THE TEXAS SUPREME COURT TO REFER THE MOTION TO RECUSE (AND ANY OTHER MOTIONS RELEVANT THERETO) TO THE GOVERNOR OF THE STATE OF TEXAS SO THAT THE MATTER COULD BE ASSIGNED TO AN INDEPENDENT PANEL FOR DETERMINATION OF, AT MINIMUM, WHETHER OR NOT RECUSAL SHOULD BE REQUIRED, AMOUNTED TO AN UNCONSTITUTIONAL DENIAL OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW. (Relevant to Question 1 and 2).

Texas law clearly provides for circumstances where the entire Texas Supreme Court is rendered incapable of hearing the

matter presented or then at issue. This same law would suffice to allow the appointment of a neutral independent panel to determine whether or not the recusal motion, or any attendant motion which requires the jurists to weigh and resolve facts presented, should be granted or denied. Texans United, as a person under the law, was entitled to review of its Motion to Recuse and challenge to the sitting jurists of the Texas Supreme Court by a fair and impartial panel of jurists who had no interest in the pending litigation and/or did not live, work or breathe in the affected area. The referral of the matter to be decided by jurists, challenged under the same basis, whose need for recusal was still awaiting determination, violated the Petitioner's Fourteenth Amendment rights to due process of law.

5. TO PERMIT THE REMOVAL OF RECORDS FROM THE PUBLIC DOMAIN UNDER A SECRET CONFIDENTIALITY AGREEMENT (AND WITHOUT PUBLIC HEARING) VIOLATED THE RIGHTS OF THE PRESS AND PUBLIC TO INFORMATION CONCERNING THE WORKINGS OF GOVERNMENT, AND DENIED THEM ACCESS TO PUBLIC PROPERTY, WITHOUT DUE PROCESS OF LAW. (Relevant to Question 7).

6. TO PERMIT THE AGREED, SECRET REMOVAL OF COURT RECORDS HAVING A POTENTIALLY DEVASTATING IMPACT ON THE PUBLIC HEALTH, SAFETY AND WELFARE, WITHOUT PUBLIC NOTICE OR HEARING, INFRINGED UPON PETITIONER'S AND ALL CITIZENS OF THE STATE OF TEXAS' BASIC FUNDAMENTAL RIGHTS TO LIFE, LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW. (Relevant to Question 7).

ARGUMENTS FOR FIVE AND SIX ABOVE

Removal of safety related information (of this potential magnitude) from the public domain without notice or a hearing deprived and infringed upon, not merely Petitioner's rights, but also on the rights of all citizens of the State to life, liberty and property, without due process of law. Public information is the public's property and domain. Once information is made a part of the public domain through court filings and reliance on the judicial

branch of government, it becomes public property or otherwise confers rights on the public (and the press) which theretofore did not exist. In order to remove this information from the public domain, due process of law must be followed.

7. TO PERMIT THE AGREED, SECRET REMOVAL OF COURT RECORDS HAVING A POTENTIALLY DEVASTATING IMPACT ON THE PUBLIC HEALTH, SAFETY AND WELFARE, WITHOUT PUBLIC NOTICE OR HEARING, VIOLATED THE RIGHT OF FREE SPEECH AND OF THE PRESS AS GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION. (Relevant to Question 6).

Rule 76a was initially enacted and codified as a result of pressure from the public and press in its efforts to prevent concealment of, and free access to, information which could be vital to the public's health, safety and welfare. Secret agreements of this type prevent information from being provided to the press and to members of the general public and, therefore, by the nature of the abuse and violation, prevents challenge to the secrecy agreements by the most affected persons. (In this instance; however, it is what they don't know that will or may hurt them.) The press and members of the Austin populace were denied knowledge of the allegations (and certainly of their specific claims) as well as denied access to the documentation which supported the allegations made by John Sexton. Once these documents were/are returned, the files will be closed and Sexton's silence will be guaranteed (by the prior agreement). It is the public and the press, who were without the knowledge and basis to determine even the need or basis to challenge the parties' agreement, who may unnecessarily and tragically suffer.

Petitioner is aware that no agency of the press is a party to this cause; however, in order to determine the seriousness of the need for protection of such First Amendment rights, and to understand the vigor compelling Petitioner to seek review, one need only read John Sexton's affidavits as attached to the original Application for Writ of Error to the Texas Supreme Court. Those allegations, made under oath by a thirty year, highly respected member of Texaco upper management - Texaco's own head of Corporate Safety - speak far more than this petitioner could ever

say about the need to righteously and fervently protect First and Fourteenth Amendment guarantees. Petitioner offers those affidavits again now and incorporates the same as if fully set forth at length.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Texas Supreme Court in this matter.

DATED: February 1, 1995

Respectfully submitted,

VALORIE W. DAVENPORT
Attorney for Petitioner
Texas State Bar #05419500
1100 Louisiana, #4450
Houston, Texas 77002
(713) 655-1500
(713) 655-0077 FAX

APPENDIX A

89-006630

JOHN R. SEXTON, Plaintiff v. TEXACO, INC., TEXACO CHEMICAL CO., L. GARBRECHT, JR. and W. B. REALS, Defendants.	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 215TH JUDICIAL DISTRICT
TEXANS UNITED EDUCATION FUND and VALORIE W. DAVENPORT Intervenors, v. TEXACO INC. and TEXACO CHEMICAL CO., Defendants.	

ORDER TO DISMISS TEXANS UNITED EDUCATION FUND'S AND VALORIE W. DAVENPORT'S PETITION IN INTERVENTION

BE IT REMEMBERED that on this day there came on for hearing in due order the Motion to Dismiss filed herein by Defendants Texaco Inc. and Texaco Chemical Co., seeking an Order Dismissing the Motion to Vacate Sealing Agreement, Request for Evidentiary Hearing and Motion for Injunctive Relief filed herein by Intervenors Texans United Education Fund and Valorie W. Davenport. The Motion having been timely filed, the Court considered said Motion, the pleadings, the evidence, arguments of counsel, and all other matters property before it, and the Court is of the opinion and hereby finds that the Motion should be and it is hereby GRANTED.

IT IS, ACCORDINGLY, ORDERED, ADJUDGED AND DECREED that the Motion to Vacate Sealing Agreement, Request for Evidentiary Hearing and Motion for Injunctive Relief filed herein by Intervenors Texans United Education Fund and Valorie W. Davenport be, and it is hereby DISMISSED, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs incurred herein are taxed against Intervenors Texans United Education Fund and Valorie W. Davenport, jointly and severally, and let execution issue if same not be promptly paid.

SIGNED on the 9th day of October, 1992.

/s/
EUGENE CHAMBERS, JUDGE
215th Judicial District Court

APPROVED:

GLEN E. CLOVER, P.C.
A Professional Corporation

By: /s/_____
Glen E. Clover
SBN #04412000
Suite 865
Sugar Creek National Bank Building
One Sugar Creek Center Boulevard
Sugar Land, Texas 77478
(713) 491-1275

ATTORNEY FOR DEFENDANTS
TEXACO INC. AND TEXACO
CHEMICAL CO.

APPENDIX B

Dismissed and Opinion filed July 1, 1993.

In the

Fourteenth Court of Appeals

NO. A14-92-01201-CV

TEXANS UNITED EDUCATION FUND
AND VALORIE W. DAVENPORT, Appellants

V.

TEXACO INC. AND TEXACO CHEMICAL CO.,
Appellees

==========

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 89-06630

==========

OPINION

Appellants, Valorie Davenport and Texans United Education Fund, appeal the trial court's dismissal of their plea in intervention, for want of jurisdiction. In the intervention, appellants asserted a right to contest the propriety and enforceability of a certain non-disclosure order signed by the court in the original action. The trial court considered and rejected appellant's argument that Texas Rule of Civil Procedure 76a provided continuing jurisdiction in the case, and found that no sealing order had been entered as to certain Texaco documents. By three points of error, appellants contend the trial court erred in granting Texaco's motion to dismiss appellant's plea in intervention and in failing to follow the requirements of Rule 76a. We dismiss for lack of jurisdiction.

This case was originally filed by John Sexton in 1989, against Texaco Inc. and several individuals.[1] The suit was filed after Sexton, a thirty-year employee and manager of Texaco's Corporate Safety Department was fired for allegedly reporting illegal activities in the workplace. His reports reflected activities at several Texaco facilities which had a probable adverse effect upon the health and safety of the general public. In his original petition, Sexton alleged breach of an express and implied employment contract, employment torts, age discrimination, and wrongful discharge.

In the course of discovery in the original action, Sexton requested and received voluminous documents from Texaco, including various documents relating to safety matters at some Texaco facilities (the safety documents), together with Sexton's correspondence to and from Texaco's counsel. Sexton filed most of these safety documents as exhibits to various pleadings in the origianl action. Texaco filed a motion for protective order in regard to twenty-one documents and submitted those documents for in camera inspection, under claims that such documents were privileged. The trial court granted Texaco's motion with respect to the twenty-one documents, after finding they were privileged and not subject to production.

In a petition for writ of mandamus filed with the First Court of Appeals, Sexton appealed the granting of the protective order relating to the twenty-one safety documents, as well as an April 1991 protective order limiting plaintiff's discovery to the two-year period prior to Sexton's discharge. Prior to any ruling from the First Court of appeals, the parties reached a settlement of the original action through court-ordered mediation. The settlement agreement provided, among other things, for Sexton's return of documents produced to him by Texaco in discovery. Pursuant to the settlement agreement, the original action was dismissed on joint motion, on February 18, 1992. Sexton also filed a motion to dismiss the petition for writ of mandamus before

---

[1] Sexton, an appellee in the present action, was originally represented by the Joan Luccie Bain of the law firm of Nelkin & Nelkin. Appellant, Valorie Davenport was subsequently retained as co-counsel. The parties are now in opposition due to differences of opinion regarding certain trial court orders executed during the discovery process of the original action.

the First Court of Appeals. However, appellant, Davenport, was in disagreement with lead counsel over the settlement agreement and the subsequent court order. As a result, Davenport filed a supplemental motion to dismiss the mandamus wherein she requested that, as a condition of dismissal, the court of appeals require Texaco to maintain the protected documents as required by Texas Rule of Civil Procedure 76a (vernon Supp.1993). The First Court of Appeals subsequently withdrew leave to file the petition for mandamus without granting the relief sought under 76a.

On August 6, 1992, more than thirty days after the trial court's dismissal of the original action, Davenport and Texans United, filed their petition in intervention. The intervenors argued that the trial court still had jurisdiction under the provisions of Rule 76a which provides for continuing jurisdiction in matters where the trial court has granted a sealing order under the provision of that rule. Texaco responded, arguing that Rule 76a was not applicable because no sealing order was ever entered in this case and moved to dismiss for want of jurisdiction. The trial court dismissed intervenors' motions, finding that no sealing order had been requested or entered, and that it did not have jurisdiction to hear the motions. It is from this dismissal that the instant appeal comes.

In their second and third points of error, appellants contend the trial court erred in not following the procedural and substantive requirements of Rule 76a. Appellants argue that the April 1991 protective order and the order dismissing their plea in intervention acted as sealing orders, and as such, the requirements of Rule 76a must be followed.

In 1990, the Supreme Court of Texas promulgated Texas Rule of Civil Procedure 76a, which provides guidelines and procedures for sealing court records. TEX.R.CIV.P. 76a (Vernon Supp.1993). Included within the guidelines of the rule are the requirements of notice, public hearing and proper written motion. The purpose of the rule is to prevent an interested nonparty from waiting on the sidelines until a court issues an order, and then intervene, forcing relitigation of the issues, if not satisfied with the outcome. *Public Citizens v. Insurance Services Office Inc.*, 824 S.W.2d 811 (Tex.App.--Austin 1992, no writ).

Rule 166b.5 of the Texas Rules of Civil Procedure authorizes the trial court to enter a protective order. TEX.R.CIV.P. 166.5 (Vernon Supp.1993). The trial court's authority under this rule extends to "ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted." TEX.R.CIV.P. 166b.5(c). Any order under this subsection that involves "court records" must comply with Rule 76a. TEX.R.CIV.P. 166.5(c). thus, when a trial court receives a motion for protective order under Rule 166b.5, the rule clearly provides that Rule 76a is not implicated unless documents sought to be protected include "court records" as defined in Rule 76a. *Ford Motor Co. v. Benson*, 846 S.W.2d 487, 491 (Tex.App.--Houston [14th Dist.] 1993, no writ). The non-movant in a rule 166b.5 proceeding has the burden of showing the court that there must first be compliance with Rule 76a by establishing that some or all of the documents are "court records." *Id.*

Paragraph 2 of Rule 76a provides a definition of those documents constituting "court records." Subsection (a) of paragraph 2 expressly excludes from the definition of "court records," those "documents filed with a court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents." TEX.R.CIV.P. 76a___.

In its dismissal of intervenors' plea in intervention, the trial court found that no sealing order had been requested or entered in this case. After reviewing the entire record, there is no evidence that anything more than a protective order was executed by the trial court concerning the twenty-one safety documents. There is no evidence of a showing by appellants to the trial court that the twenty-one documents constituted "court records." We hold Rule 76a was not implicated under the present facts because the documents in question were submitted to the court for in camera inspection and were therefore expressly excluded from the purview of the Rule. Appellant's second and third point of error are overruled.

In their first point of error, intervenors contend the trial court erred in finding it lacked jurisdiction to hear their plea in intervention and other related motions. Their argument is premised on the applicability of 76a, specifically, paragraph 7, which provides for continuing jurisdiction in the court that issues

the sealing order. Because of our holding in points of error two and three, that Rule 76a was not implicated in the present case, the continuing jurisdiction paragraph contained within that rule is likewise inapplicable.

The trial court entered its order dismissing the original action on February 18, 1992, on joint motion of the parties. No motion for new trial or appeal was filed in regard to the trial court's dismissal order entered on that date. A trial court loses its plenary power to modify, vacate, set aside or amend its judgment thirty days after the signing of the judgment. *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex.1984); TEX.R.CIV.P. 329b(d) and (f). The trial court in the instant case lost its plenary jurisdiction to modify or amend its judgment on March 20, 1992. Furthermore, a plea in intervention comes too late if filed after judgment and may not be considered unless and until the judgment has been set aside. *Id.; Comal County Rural High School District No. 705 v.* ____ 158 Tex. 564, 314 S.W.2d 956 (1958). Intervenors' plea in intervention was filed on August 6, 1992, well after the thirty day extension of plenary power allowed under Rule 329b. We hold therefore, that the order of dismissal signed on February 18, 1992, is final and appellants' plea in intervention was untimely. Appellant's first point of error is overruled.

Accordingly, we dismiss for want of jurisdiction.

/s/ Norman R. Lee
Justice

Judgment rendered and Opinion filed July 1, 1993.

Panel consists of Chief Justice J. Curtiss Brown, and Justices Ellis and Lee.

Publish - TEX.R.APP.P. 90.

APPENDIX C

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

September 1, 1994

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Ms. Laura A. Sapsowitz
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Mr. Joseph Mart Mitchell
Texaco, Inc.
P.O. Box 4596
Houston, TX 77210-4596

Ms. Phyllis G. Schrader
Weycer Kaplan Pulaski & Zuber
1400 Summit Tower
Eleven Greenway Plaza
Houston, TX 77046-1198

RE: Case No. D-4158
Style: TEXANS UNITED EDUCATION FUND and VALORIE W. DAVENPORT V. TEXACO, INC., TEXACO CHEMICAL CO., and JOHN R. SEXTON

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied". Petitioner's motion to expedite is dismissed as moot.

Sincerely,
John T. Adams, Clerk

by: /s/
Blanca Morin, Deputy

APPENDIX D

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 6, 1994

Ms. Valorie W. Davenport
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1400 Summit Tower
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Houston, TX 77046-1198

RE: Case No. D-4158
Style: TEXANS UNITED EDUCATION FUND and VALORIE W. DAVENPORT V. TEXACO, INC., TEXACO CHEMICAL CO., and JOHN R. SEXTON

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioners' motion to recuse, as supplemented, in the above referenced case pursuant to the provisions of Rule 15(c), Texas Rules of Appellate Procedure. Petitioners' motion to supplement the motion to recuse was granted.

Respectfully yours,
JOHN T. ADAMS, CLERK

/s/

Peggy Littlefield,
Chief Deputy Clerk

APPENDIX E

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 3, 1994

The Honorable Dan Morales
Attorney General of Texas
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Austin, TX 78711-2548

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Ms. Phyllis G. Schrader
Weycer Kaplan Pulaski & Zuber
1400 Summit Tower
Eleven Greenway Plaza
Houston, TX 77046-1198

RE: Case No. D-4158
Style: TEXANS UNITED EDUCATION FUND and VALORIE W. DAVENPORT V. TEXACO, INC., TEXACO CHEMICAL CO., and JOHN R. SEXTON

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioners' motion for rehearing of the application for writ of error in the above styled case. Petitioners' motion for rehearing of motion to recuse was also overruled.

Respectfully yours,

JOHN T. ADAMS, CLERK

/s/
Peggy Littlefield,
Chief Deputy Clerk

cc: Governor Ann Richards

APPENDIX F

TEXAS RULES OF CIVIL PROCEDURE
GENERAL RULES
TRCP 18b

TRCP 18b. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF JUDGES

(1) **Disqualification**. Judges shall disqualify themselves in all proceedings in which:

(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or

(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or

(c) either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) **Recusal**. A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he or a lawyer with whom he previously practices law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

(e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(f) he or his spouse, or a person within the third degree of

relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's knowledge likely to be a material witness in the proceeding.

(g) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

(a) "proceeding" includes pretrial, trial, or other stages of litigation;

(b) the degree of relationship is calculated according to the civil law system;

(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that hold securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a

"financial interest" in securities held by the organization;

(iii) the propriety interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(v) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(6) If a judge does not discover that he is recused under subparagraphs (2)(e) or (2)(f)(iii) until after he has devoted substantial time to the matter, he is not required to recuse himself if he or the person related to him divests himself of the interest that would otherwise require recusal.

J-IV Invest v. David Lynn Machine, Inc., 784 S.W.2d 106, 107 (Tex.App.--Dallas 1990, no writ). "Texas courts have repeatedly rejected the argument that campaign contributions might create a bias to prompt recusal."

See also Tex.Const.art. 5, §11; Tex.Rev.Civ.Stat. 5996h; Gov't Code §§21.005; 74.059(c)(3); TRAP 15, 15a; Commentaries, "Motion to Recuse," p.583; FORMS 7C.

Added by order of July 15, 1987, eff. Jan. 1, 1988. Amended by order of April 24, 1990, eff. Sept. 1, 1990.

Change by amendment effective Sept. 1, 1990; Rule entirely rewritten.

Comment to 1990 change: The grounds for a judge's mandatory recusal have been expanded from those in prior TRCP 18b(2).

TEXAS RULES OF CIVIL PROCEDURE
PLEADING
TRCP 76a

TRCP 76a. SEALING COURT RECORDS

1. **Standard for Sealing Court Records**. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. **Court Records**. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

(3) documents filed in an action originally arising under the Family Code.

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable

adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. **Notice.** Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

4. **Hearing.** A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motions filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. **Temporary Sealing Order.** A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need for specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall

direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. **Order on Motion to Seal Court Records**. A motion relating to sealing or unsealing court record shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court record which are to be sealed; and the time period for which the sealed portions of the court record are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. **Continuing jurisdiction**. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court record shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

8. **Appeal**. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. **Application**. Access to documents in court files not defined as court record by this rule remains governed by existing law.

This rule does not apply to any court record sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

Dallas Morning News, Inc. v. Fifth Court of Appeals, 842 S.W.2d 655, 657-58 (Tex.1992). "The press and the public have a right to be present at all proceedings in the trial of the underlying case, and to report all that they observe... [T]he issue in this case is whether the court of appeals is authorized to issue an order to protect its jurisdiction over an appeal pursuant to rule 76a of the Texas Rules of Civil Procedure. The court of appeals has such power."

Eli Lilly and Co. v. Marshall, 829 S.W.2d 157, 158 (Tex.1992). "[T]he trial court abused its discretion by refusing to conduct a hearing and render decision on the motion in compliance with Rule 76a."

Chandler v. Hyundai Motor Co., 829 S.W.2d 774, 774 (Tex.1992). "[T]he court of appeals dismissed Chandler's interlocutory appeal under Rule 76a(8)...[W]e believe that an interlocutory appeal pursuant to Rule 76a(8) was the proper method for complaint of the trial court's action in this case."

Public Citizen v. Insurance Servs. Office, Inc., 824 S.W.2d 811, 813 (Tex.App.--Austin 1992, no writ). TRCP "76a(7) prevents an interested non-party ... from waiting on the sidelines until a court issues an order, and then, if dissatisfied with the outcome, intervening and forcing the parties and court to relitigate the issue."

Davenport v. Garcia, 834 S.W.2d 4, 24 (Tex. 1992). "Court record 'are presumed to be open to the general public' [TRCP] 76a(1) ... The sealing of records must meet the

procedural prerequisites set forth in Rule 76a."

See Commentaries, "Sealing Records," p. 618; FORMS 7J.

Source: New rule effective Sept. 1, 1990. Added by order of April 24, 1990, eff. Sept. 1, 1990. Comment to 1990 change: New rule to establish guidelines for sealing court records in compliance with Government Code §22.010.

RULE 121c. MANDAMUS, PROHIBITION AND INJUNCTION IN CIVIL CASES

(c) **Action on Motion**. The court may request that respondent or the real party in interest submit a reply, and in that event, the clerk will so notify all identified parties. When it appears that relator may be unduly prejudiced by delay, or the court concludes requested, it may act upon the motion without giving prior notice to the respondent. If the court is of the tentative opinion that relator is entitled to the relief sought, the motion for leave to file will be granted, the petition filed, and the cause placed upon the docket. Otherwise, the motion will be overruled.

RULE 133. ORDERS ON APPLICATIONS FOR WRIT OF ERROR

(a) **Notation on Denial of Appliction**. In all cases where the judgment of the court of appeals is correct and where the principles of law declared int he opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application prsents no error which requires reversal, or which is of such importance to the jurisprudence of the State as to require correction, the Court will deny the application with the notation "Writ Denied." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction." The Court may accompany the denial of an application with such explanatory remarks as it may consider appropriate.

(b) **Moot Cases**. If a cause or an appealable portion thereof is moot, the Supreme Court may, in its discretion and after notice to the parties, upon granting writ of error and without hearing argument with reference thereto, dismiss such cause or the appealable portion thereof without reference to the merits of the appeal.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988, and by Court of Criminal Appeals effective Jan. 1, 1989; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To make review discretionary where there is conflict in prior decisions and to make textual corrective changes.

APPENDIX G

No. 89-006630

JOHN R. SEXTON	§	IN THE DISTRICT
	§	COURT
	§	
VS.	§	HARRIS COUNTY,
	§	TEXAS
	§	
TEXACO, INC., TEXACO	§	
CHEMICAL CO.,	§	
L. GARBRECHT, JR. and	§	215TH JUDICIAL
W. B. REALS	§	DISTRICT

AFFIDAVIT OF JOHN R. SEXTON IN SUPPORT OF PLAINTIFF'S SECOND MOTION TO COMPEL

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared JOHN R. SEXTON, who, having been duly sworn by me, stated the following:

1. "My name is JOHN R. SEXTON. I am fifty-eight (58) years of age and am fully capable of making this affidavit. The facts contained herein are within my personal knowledge and are true and correct.

2. "I am the Plaintiff in cause number 89-006630, John R. Sexton v. Texaco, Inc., et al., In the District court of Harris County, Texas, 215th Judicial District Court. I have reviewed Defendants' Texaco, Inc., Texaco Chemical Co., L. Garbrecht, Jr., and W.B. Reals' Response to Plaintiff's Second Motion to Compel Production of Documents.

3. "I was initially employed by Texaco on November 19, 1957. I worked for Texaco from that date through November 13, 1987, when I was summarily dismissed from my position of Manager of the Safety Department. During that thirty (30) year period, I held several senior engineering and management positions. I was in charge of the Corporate Safety Department on December 1, 1978.

4. "In my capacity as head of the Safety Department, I was responsible for monitoring corporate safety activities and policies involving over thirty (30) subsidiaries, departments, and divisions of Texaco worldwide. In addition, I was responsible for implementing Texaco, Inc.'s disciplinary procedures with the safety department.

5. "I have always performed my job responsibilities in a capable, productive, and satisfactory manner. I was never advised otherwise by any of my written commendations. My competent performance is reflected by my performance appraisals. I have never been reprimanded by any Texaco supervisor or told that my performance was inadequate. I have never been accused of wrongdoing n connection with my work. The justification offered by my superior, Garbrecht, for my termination on November 13, 1987, was that my management style no longer fit in with the new "participative" style of management being implemented by Texaco.

6. "I am a licensed professional engineer certified in New York, New Jersey, and Texas. I have a bachelor's degree in civil engineering with a major in structures. also hold a master of science degree in industrial management. I am a certified safety professional, certified as such by the Board of Certified Safety Professionals of the Americas, Inc. I served as a consultant to the American Petroleum Institute ("API") Committee on Safety and Fire Protection for over ten years. I am a past member of the board of directors of the Texas Safety Association. I served on the executive committee of the National Safety Council, Petroleum Section, for eight years. I have served as a member of the National Safety Council's Safety Committee for ten years. I am a past member of the Organizational Resources Counselors. I have participated on numerous API task forces dealing with environmental and safety issues. In recent years, I have served as a consultant to API dealing with environmental and safety issues.

7. "While I served in the capacity of Manager of Texaco's Corporate Safety Department, in early 1985 the Safety Department began conducting safety reviews called "Hazard Assessments" at the four Texaco Chemical Company facilities. These are Austin Research Laboratory, the Port Arthur Chemical Plant, the Port Neches Chemical Plant, and the Conroe Chemical

Plant. As a result of these hazard assessments, which were performed by a team of members from the corporate safety department and from the plant being reviewed, Potential Accident Liability Evaluation ("PALE") reports, were prepared outlining the findings and recommendations of the Hazard Assessment Teams.

8. "I have been with Texaco for thirty (30) years, and had been manager of Texaco's Safety Department since 1978. During that time, I became familiar with Texaco's internal policies on how to write in-house safety reports so that on their face they will not reveal problem conditions in inflammatory language, yet provide sufficient information for the operating departments to take the corrective action that is recommended. Attached hereto as Exhibit A and incorporated herein by reference is a true and correct copy of a memorandum I received from corporate counsel with instructions regarding Texaco's official policy regarding preparation and distribution of the hazard assessment or "PALE" reports. As the policy reflects, only when hazard assessments and safety and los control reports reflect a "potential for catastrophic occurrences," are they forwarded to the legal department for review. The legal department reviews the reports for any problematic language which could be used against the company as showing corporate knowledge of existing violations. Furthermore, the reports systematically recited language to the effect that "no safety or operational deficiencies exist which pose an immediate threat to plant personnel or the community which warrant immediate action or termination of operations." This language is placed in all reports, regardless of the severity of the conditions that exist, in order to obtain legal approval to distribute the report to the various operating departments for corrective action to be taken. This phrase, or words to that effect, are inserted in every report of a Texaco safety review which identifies areas which could be catastrophic. Once the reports were reviewed and approved by corporate counsel, and in some instances outside counsel, they were returned to me for circulation to the operating departments to which they pertain. The actual reports which were distributed to the operating departments are not handled as "privileged and confidential," and did not reflect communications between counsel and members of the operating department for the purpose of facilitating the rendition of legal services. To the contrary, these PALE reports operated as guidelines to the operating departments for the corrective action recommended in the reports.

9. "The terminology "PALE" report is a term used to refer to the reports prepared to indicate the findings of safety review committees during the conduct of the hazard assessment reviews. There are PALE reports referring to each of the four chemical company facilities from early 1985. Each of those reports are forwarded to corporate counsel for review because each of those reports contained findings revealing a potential for catastrophic occurrences. In many instances, the reports contained information which reflected violations of existing safety or environmental regulations which carried civil and criminal penalties. The reports did not contain specific references to these statutes. Such references were intentionally left out. Thus, in order to interpret the report, one must be familiar with safety laws and apply them to the underlying findings. Even these are sometimes deleted from the final document or understated. Each of these reports were returned from the legal department and were distributed to the respective operating facility to which it pertained.

10. "For example, in May 1987, while I served in the capacity of manager of Texaco's corporate safety department, I learned that a Texaco Chemical Company facility, known as the Austin Research Laboratory, had existing conditions which violated the Texas Hazard Communication Act provisions regarding training programs for plant operators, plant safety rules, lack of personal protection equipment, and testing of that equipment. Further deficiencies were found in that the facility did not have standardized operational procedures on process function or chemical handling duties including testing and documentation. There was no procedure in place to determine whether trainees were qualified for plant operation, thereby subjecting trainees to substantial risk of personal injury. The plant also lacked any periodic refresher course for permanent or contract employees to insure that such employees were aware of the dangers and were qualified to work with the chemicals that were maintained there. Even worse, the Austin research laboratory stored and worked with chemicals that are so volatile that an accidental release would cause death and/or serious injury to all persons within a 10-mile radius of the plant; yet, the plant failed to establish emergency response procedures. I learned of these violations through a quantitative hazard evaluation or risk analysis that was performed by a joint committee which was composed of members of the corporate safety department, members of the chemical company

safety personnel and an outside consultant. The risk analysis was conducted as a follow up to a hazard assessment conducted by corporate safety which revealed the need to investigate further. The evaluation was performed at my request after I had spent approximately six months attempting to get approval from a Texaco Chemical Company to proceed. I received the Phase I report in May 1987.

11. "In addition to the violation of the Texas Hazard Communication Act, the Austin Texaco Chemical facility was in violation of a City of Austin ordinance, Ordinance No. 84-122000; which was enacted on December 20, 1984. Specifically, the Austin Research Laboratory violated that ordinance by not providing a materials management plan, including a contingency plan in the event of an emergency. The May 1987 risk analysis revealed that there had been two chemical leaks at the facility which had not been reported to the city as required by ordinance.

12. "Finally, the report I received in May 1987 regarding the Texaco Chemical Company Austin Research Lab revealed violations of the Federal Water Pollution Control Act of 1972. Violations consisted of the discharge of contaminated storm water runoff from the plant into an intermittent tributary or Waller Creek, which runs parallel to and outside and the Western plant boundary. The Federal Water Pollution Control Act imposes criminal penalties on any person who willfully or negligently violates the statute. The criminal penalties include a fine of not less than $2,500 nor more than $25,000 per day violation and by imprisonment of not more than one year or by both. Because I was manager of Texaco's safety department with the responsibility of insuring that violations were promptly remedied, and because the May 1987 report gave me actual knowledge of the violation, I would have been guilty of criminal conduct had I failed to pursue remedial action and concealed the violation.

13. "The PALE reports regarding the Port Neches, Conroe, and Port Arthur plants contained information that would help me to identify the safety violations that existed at those facilities, although the statutes are not identified by name in the reports.

14. "Don McKenna, who worked under my supervision n the Texaco Safety Department, was responsible for

supervising the area coordinators for Texaco Safety Department who participated in the hazard assessments of the Texaco Chemical Co. facilities. Mr. McKenna also personally participated on some of the hazard assessment teams at Texaco chemical plants. His deposition in this case was taken September 12, 1991. He confirmed his recollection that each of the PALE reports prepared on the chemical plants contained findings of potentially hazardous or disastrous conditions and recommended that further risk analysis and corrective action be taken.

15. "I attended the deposition of Don McKenna taken in this case on September 12, 1991. Attached hereto as Exhibit B are true and correct copies of excerpted pages from the deposition.

16. "The Occupational Safety and Health Administration ("OSHA") and other state and local agencies charged with the administration of safety and environmental laws, do not have the staff, or directive, to perform periodic reviews on every operating chemical or petroleum industry facility throughout the United States. Texaco alone has over five hundred facilities and even with internal reviews, Texaco cannot review those facilities every year. During the time I served as Safety Manager of Texaco, OSHA reviewed two of Texaco's five hundred facilities in a year, at the most, and these were not detailed reviews. In some years, they did not review any. Thus, there are hundreds of facilities which have not ever been reviewed by OSHA, and at the rate OSHA was conducting its reviews during the time I served as Safety Manager, it would require over three hundred years before OSHA would have reviewed every facility."

Further Affiant sayeth not.

/S/
JOHN R. SEXTON

SUBSCRIBED AND SWORN TO before me, by John R. Sexton, on this 16th day of September, 1991.

/S/
Notary Public in and for
The State of TEXAS

[SEAL]

NO. 89-006630

JOHN R. SEXTON	§	IN THE DISTRICT
	§	COURT OF
	§	
VS.	§	HARRIS COUNTY,
	§	TEXAS
	§	
TEXACO, INC., TEXACO	§	
CHEMICAL CO.,	§	
L. GARBRECHT, JR. and	§	215TH JUDICIAL
W.B. REALS	§	DISTRICT COURT

SECOND SUPPLEMENTAL AFFIDAVIT
OF JOHN SEXTON

THE STATE OF TEXAS	§	
	§	
COUNTY OF HARRIS	§	

BEFORE ME, the undersigned authority, on this day personally appeared JOHN R. SEXTON, who, having been duly sworn by me, stated the following:

1. "My name is JOHN R. SEXTON. I am fifty-six (56) years of age and am fully competent to make this affidavit. The facts contained herein are within my personal knowledge and are true and correct.

2. "I am the Plaintiff in cause number 89-006630, John R. Sexton v. Texaco, Inc., et al., In the District Court of Harris County, Texas, 215th Judicial District Court. I have reviewed Defendants' Texaco, Inc., Texaco Chemical Co., L. Garbrecht, Jr., and W.B. Reals' Second Motion for Partial Summary Judgment in the above-referenced cause.

3. "I was initially employed by Texaco on November 19, 1957. I worked for Texaco from that date through November 13, 1987, when I was summarily dismissed from my position of manager of the Safety Department. During that thirty (30) year period, I held several senior engineering and management positions. I was in charge of the Corporate Safety Department on December 1, 1978.

4. "In my capacity as head of the Safety Department, I was responsible for monitoring corporate safety activities and policies involving over thirty (30) subsidiaries, departments, and divisions of Texaco worldwide. In addition, I was responsible for implementing Texaco, Inc.'s disciplinary procedures with the safety department.

5. "I have always performed my job responsibilities in a capable, productive, and satisfactory manner. I was never advised otherwise by any of my written commendations. My competent performance is reflected by my performance appraisals. I have never been reprimanded by any Texaco supervisor or told that my performance was inadequate. I have never been accused of wrongdoing n connection with my work. The justification offered by my superior, Garbrecht, for my termination on November 13, 1987, was that my management style no longer fit in with the new "participative" style of management being implemented by Texaco.

6. "I am a licensed professional engineer certified in New York, New Jersey, and Texas. I have a bachelor's degree in civil engineering with a major in structures. also hold a master of science degree in industrial management. I am a certified safety professional, certified as such by the Board of Certified Safety Professionals of the Americas, Inc. I served as a consultant to the American Petroleum Institute ("API") Committee on Safety and Fire Protection for over ten years. I am a past member of the board of directors of the Texas Safety Association. I served on the executive committee of the National Safety Council, Petroleum Section, for eight years. I have served as a member of the National Safety Council's Safety Committee for ten years. I am a past member of the Organizational Resources Counselors. I have participated on numerous API task forces dealing with environmental and safety issues. In recent years, I have served as a consultant to API dealing with environmental and safety issues.

7. "In may 1987, while I served in the capacity of manager of Texaco's Chemical Company facility, known as the Austin Research Laboratory, had existing conditions which violated the Texas Hazard Communication Act provisions regarding training programs for plant operators. Deficiencies were found regarding the plant's program covering plant operations, plant safety rules, lack of personal protection

equipment, and testing of that equipment. Further deficiencies were found in that the facility did not have standardized operational procedures on process function or chemical handling duties including testing and documentation. There was no procedure in place to determine whether trainees were qualified for plant operation, thereby subjecting trainees to substantial risk of personal injury. The plant also lacked any periodic refresher course for permanent or contract employees to insure that such employees were aware of the dangers and were qualified to work with the chemicals maintained there. Even worse, the Austin research laboratory stored and worked with chemicals that are so volatile that an accidental release would cause death and/or serious injury to all persons within a 10-mile radius of the plant; yet, the plant failed to establish emergency response procedures. I learned of these violations through a quantitative hazard evaluation or risk analysis that was performed by a joint committee which was composed of members of the corporate safety department, members of the facility, members of the chemical company safety personnel and an outside consultant. The risk analysis was conducted as a follow up to a hazard assessment conducted by corporate safety which revealed the need to investigate further. The evaluation was performed at my request after I had spent approximately six months attempting to get approval from a Texaco Chemical Company to proceed. I received the Phase I report in May 1987.

8. "Immediately upon learning of the violations that existed at the Austin's facility, I began to seek authorization to proceed with Phase II, which was designed to develop appropriate remedial measures. My efforts included meetings with Texaco and Texaco Chemical Company management, including vice presidents. I wrote a number of letters to the Texaco Chemical Company personnel asking for authorization to continue the study and take follow-up measures. W.B. Reals, the Chief Executive Officer of Texaco Chemical needed to give authorization for me to proceed. I was finally able to make a presentation to Mr. Reals and the Texaco Chemical Company Policy Committee on July 20, 1987. At that time, I arranged to have a presentation made by a consultant to define the parameters of Phase II and associated costs. Shortly after the meeting I was told that Phase II had been approved, but despite repeated requests, I could not get an executed contract from Texaco Chemical so that Phase II could begin. I began writing letters to Texaco Chemical Company

asking that the contract be executed and returned so that we could proceed with the second stage, and emphasizing the urgency of the situation. Shortly thereafter, on November 13, 1987, I was terminated from my position at Texaco. W.B. Reals, as Senior Vice President of Texaco, Inc., was my second in line supervisor at the time. He was also chairman of the Board of Texaco Chemical Company.

9. "In my capacity as manager of Texaco's corporate safety department, there were numerous occasions when I was exposed to hazardous chemicals in the work place. My responsibilities, included the necessity that I visit the functioning Texaco facilities across the world where hazardous chemicals during the ordinary course of performance of my duties. In addition, whenever there was an emergency such as a chemical explosion, my responsibilities required that I visit the site to determine the cause of the accident. In fact, during 1987, one of the priority projects I was engaged in involved developing emergency response procedures for various facilities, which required a substantial amount of travel to these sites. On many occasions I visited the sites personally; on others, I sent my subordinates to conduct.

10. "In addition to the violation of the Texas Hazard Communication Act, the Austin Texaco Chemical facility was in violation of a City of Austin ordinance, Ordinance No. 84-122000; which was enacted on December 20, 1984. Specifically, the Austin Research Laboratory violated that ordinance b not providing a materials management plan, including a contingency plan in the event of an emergency. The May 1987 risk analysis revealed that there had been two chemical leaks at the facility which had not been reported to the city as required by ordinance.

11. "Finally, the report I received in May 1987 regarding the Texaco Chemical Company Austin Research Lab revealed violations of the Federal Water Pollution Control Act of 1972. Violations consisted of the discharge of contaminated storm water runoff from the plant into an intermittent tributary or Waller Creek, which runs parallel to and outside and the Western plant boundary. The Federal Water Pollution Control Act imposes criminal penalties on any person who willfully or negligently violates the statute. The criminal penalties include a fine of not less than $2,500 nor more than $25,000 <u>per day</u> violation and by

imprisonment of not more than one year or by both. Because I was manager of Texaco's safety department with the responsibility of insuring that violations were promptly remedied, and because the May 1987 report gave me actual knowledge of the violation, I would have been guilty of criminal conduct had I failed to pursue remedial action and concealed the violation.

12. "I met with Mr. Reals' representatives from Texaco Chemical Co. Safety in January 1987, because I was told that Texaco Chemical had refused to proceed with Phase I of the risk analysis after the corporate safety department's hazard assessment revealed the hazardous chemicals being used at Austin, and the questionable conditions that existed there. Texaco Chemical officials indicated they had been instructed to oppose Phase I because it might uncover further violations, and once it could be proven that Texaco officials had knowledge, Texaco and those officials could be held liable for any accidental injury. I objected strenuously, and pointed out that we already had some degree of knowledge, and that failure to take action would in and of itself constitute criminal negligence under some of the applicable safety laws. After this meeting, I was told the Texaco chemical had approved Phase I. I believe I was terminated because I refused to ignore the violations that had been discovered and persisted in my requests to pursue remedial action. My refusal to ignore the situation constituted a refusal to commit an illegal act punishable by criminal penalties. Attached hereto as Exhibit A is a chronology of events leading up to my discharge which includes the major events relating to the Austin Research Laboratory.

13. "I reported all of these violations, as well as others revealed by the May 1987 report to various officials within Texaco Inc. who had authority to remedy the situation. I further reported to them the urgent need that the conditions be corrected, and that criminal penalties could result if no remedial action was taken. for several months, my verbal requests went unanswered so I began to request corrective action by sending written memoranda to appropriate officials. Within a few months, my employment at Texaco was summarily terminated. It should be pointed out that W.B. Reals, Defendant in this action, was acting as a representative of both Texaco Chemical Company and Texaco, Inc. As a senior vice president of Texaco Inc., he was my second in line supervisor. In addition, he was chairman of the board of

Texaco Chemical Company, which owned and operated the Austin Research Laboratory whose violations I was reporting. The violations not only constituted a condition which endangered the workers at the facility, they endangered the lives and well-being of residents living in the vicinity of the facility. This is true with regard to the federal water violation, as well as the plant's failure to provide proper training and protective equipment to employees who were handling one chemical, which if accidentally released, would result in immediate death or serious injury to all persons within a ten mile radius. The lack of approved procedures regarding the maintenance and storage of chemicals, as well as the lack of training of the persons handling them, created a substantial risk of accidental release endangering the populace of Austin."

Further Affiant sayeth not.

/S/

JOHN R. SEXTON

SUBSCRIBED AND SWORN TO before me, by John R. Sexton, on this 5th day of September, 1991.

/S/

Notary Public in and for
The State of TEXAS

[SEAL]